

Approved as Submitted: February 18, 2004

**CITY OF MORGAN HILL
JOINT SPECIAL AND REGULAR CITY COUNCIL,
SPECIAL REDEVELOPMENT AGENCY, AND
MORGAN HILL FINANCING AUTHORITY COMMISSION MEETING
MINUTES – FEBRUARY 4, 2004**

CALL TO ORDER

Mayor/Chairman/President Kennedy called the special meeting to order at 6:03 p.m.

ROLL CALL ATTENDANCE

Present: Council/Agency/Commission Members Chang, Sellers, Tate and Mayor/Chair/President Kennedy
Absent: Council/Agency/Commission Member Carr

DECLARATION OF POSTING OF AGENDA

City Clerk/Agency Secretary/Commission Secretary Torrez certified that the meeting's agenda was duly noticed and posted in accordance with Government Code 54954.2.

City Council Action

WORKSHOP

1. REVIEW OF REVISED DRAFT ENVIRONMENTAL IMPACT REPORT (EIR) FOR THE INSTITUTE GOLF COURSE AND MATHEMATICS CONFERENCE CENTER

Mayor Kennedy advised that the Council would not be taking action this evening as this evening's meeting will be used by the Council to gather information, hear reports and receive public testimony. He indicated that the Council would be discussing and taking action on the EIR at a future meeting. He encouraged members of the public who would like to address the Council this evening to submit comments in writing.

Planning Manager Rowe presented the staff report and addressed the following issues:

- Geology and soils. He indicated that the impacts associated with this section relates to increased erosion and the potential for landslide or lurching during periods of heavy rains. He indicated that the geotechnical analysis prepared did not fully address the entire site. Mitigation measure: prepare a more complete geotechnical report. He indicated that this is an area where the applicant does not agree as they believe that they have prepared two studies, to date, that adequately address this issue.
- Vegetation and Wild Life. He indicated that the EIR identified that the project site contains habitat for the California Red Legged Frog which is listed in the federal endangered species.

There is also a special status listing for the Tiger Salamander and the Western Pond Turtle. He indicated that two mitigation packages were presented in the EIR. He stated that mitigation package 1 is new and is a variation of the alternative mitigation which the applicant had proposed and is mentioned in the original draft EIR. This package involves the purchase of replacement habitat of approximately 51.2 acres (2-1 replacement as recommended by the U.S. Fish and Wildlife Service). He indicated that the applicant has agreed to comply with this mitigation measure. The second deals with managing the predatory bull frogs and other species through surveys as well as annual draining of the ponds on site. He stated that there is not an agreement by the applicant on this particular matter as the surveys completed to date have identified only one single bull frog on site. In the applicant's conversation with the Fish and Wildlife Service, they did not require the drainage of the pond(s) to remove one frog. He stated that the water quality setback that comes in this area as well as the hydrology and water quality section would increase the buffer areas to 50-feet adjacent to the creek and 25-feet elsewhere. He indicated that the applicant feels that based on their sampling of surface water there is not a need to provide greater setback from the creek. Another part of mitigation package one is the requirement to restore riparian habitat within the buffer areas along the creek. He indicated that the applicant has agreed to provide this mitigation.

- Mitigation package 2 was a mitigation in the original EIR which establishes a uniform 200-foot buffer around all creeks/breeding ponds. He indicated that this is a mitigation measure that the applicant does not agree with. He stated that mitigation measure 1 is an alternative. This is a component of package 1 that the applicant has agreed to perform and would follow through with.
- Hydrology and water quality. He indicated that this is the most extensive area of where there are impacts identified and mitigations proposed. He stated that the impact areas include offsite flooding, soil erosion, water quality, nitrogen loading, pesticides and herbicides, lake water discharge associated with draining the water ponds annually, domestic water supply, high nitrate levels that would preclude the use of well waters for domestic consumption and fire protection. He said that the mitigation would involve redesigning the ponds to provide storm water detention. The applicant, in testimony before the Planning Commission, indicated that the ponds are currently designed to provide the detention capability and therefore does not feel that it is necessary to redesign them. Following are recommended mitigation measures: 1) applicant to provide hydrology analysis to show that there is sufficient capacity in the ponds to serve this purpose. 2) Elimination of the outflow of Pond D to Foothill Avenue. He indicated that the applicant does not believe that this is necessary because the pond is not currently being used for storm water detention. 3) Obtaining a permit from the Regional Water Quality Control Board and the preparation of an erosion control plan. He indicated that the applicant has agreed to this mitigation. 4) Mitigate the non point source run off. He stated that the applicant has agreed to this mitigation. 5) Nitrogen control plan. The applicant has agreed to this mitigation measure. 6) Water quality setback. He stated that the applicant does not believe that this mitigation is necessary. 7) The applicant agrees to a chemical control application. 8) Monthly sampling and reporting is also agreed to. 8) The applicant does not deem the annual draining of the pond for additional storm capacity necessary because they believe that it is sufficient as presently designed. 9) The applicant has agreed to connect to the public water system to address the

domestic water supply and the fire supply storage. 10) Water supply and ground water depletion. He stated that the report indicates that given the amount of irrigated surface areas and the amount of water required, the project may have an impact to the ground water supply, lowering the water table. He said that the mitigation would be: 1) reduce the irrigated turf area to 55-60 acres; or 2) complete a more detailed groundwater investigation that would determine whether the amount of water being drawn is not adversely affecting the groundwater levels. He stated that the applicant is not supportive of mitigation 1 or 2 as they believe that they have sufficient data to show that they are not adversely affecting ground water supply. Also, the cost of completing a more detailed study is something that they have a concern with. He indicated that the applicant agrees with a third mitigation; researching the use of recycled water to minimize the amount of usage of ground water supply.

Mr. Rowe indicated that the above summarizes the substantive changes to the EIR and the applicant's agreement/disagreement with the identified mitigation measures. He stated that the comments of this meeting and those received during the review period will be incorporated into the final EIR. Along with the final EIR, staff will be preparing a mitigation monitoring plan that will address each of the areas. He stated that there will be public hearings scheduled before the Planning Commission and the City Council to approve the final EIR and the mitigation monitoring plan. The Council will need to certify the final EIR and adopt the plans under consideration, if necessary. He further stated that the applicant is requesting approval of a zoning amendment to establish a planned unit development (PUD) on the site. Staff anticipates that the EIR and the zoning action will occur at the same hearings. He introduced Michelle Yesney who would address the project's baseline conditions and the secondary impacts.

Michelle Yesney, vice-president with David J. Powers & Associates, indicated that she assisted City staff in the preparation of an EIR. She stated that the project that is the subject of this EIR is unusual in several respects. She said that the City approved grading for a 40-acre golf course and that a particularly difficult aspect of the project is that it was well under construction when the EIR began. She stated that substantial changes occurred to the site without the proper permitting while a 110-acre golf course was under construction. She stated that the document that was circulated in December 2003 evaluates the impact of a proposed project that was described in an application for a PUD zoning designation for the project site that was on file at the time with the City of Morgan Hill. She said that the evaluation was supplemented with information on environmental mitigations which Mr. Rowe has described and contained in a package of documents that were submitted to the City of Morgan Hill by the project proponent on March 3, 2003. She stated that these two documents constitute the bulk of the project description that is evaluated in the EIR. While various conversations were held during this time period of what the project might consist of, these documents were the only official project description that were available for analysis.

Ms. Yesney said that in identifying the environmental impact of a specific proposal, it is first necessary to establish a baseline against which the impacts of the project should be measured. She stated that both CEQA guidelines and the courts identify the importance of establishing a baseline to which the project impacts can be compared. She said that it has been argued that the impacts of the project should be compared to the physical conditions that existed on the same piece of property at the time that CEQA was enacted (e.g., 1970). She informed the Council that CEQA guidelines advise that an EIR should

normally limit its examination to changes in the existing physical condition as they existed at the time the notice of preparation is published. In the unusual condition that a notice of preparation is not published, the existing conditions in the EIR should be those conditions that existed at the time that the environmental analysis began. She indicated that her firm was retained as the environmental consultant on May 22, 2000 to begin the EIR. She stated that the golf course was partially constructed at that time and that the notice of preparation for the project was published on June 19, 2000. While changes have occurred on site since that time, she stated that virtually the entire 110-acre golf course site was graded at that point. She said that the purpose of CEQA is to inform decision makers and the public about potential affects, especially environmental affects, identify ways that environmental damage can be avoided before it occurs, prevent significant unavoidable damage to the environment, and to disclose to the public the reason why a government agency approved a project if significant environmental affects were involved. She said that based on these facts, it is clear that a project's impact must be accurately characterized in terms of what the immediate and real impacts will be. Since the existing golf course was mostly constructed at the time the notice of preparation was circulated, the baseline conditions used for evaluating the project's impacts is the golf course itself.

Ms. Yesney indicated that the City of Morgan Hill is being asked to approve the existing golf course because the golf course, as it presently exists, was built without permits. Therefore, the City of Morgan Hill is being asked to choose from three options: 1) allow the existing golf course to remain; 2) require that parts of the existing golf course be changed; or 3) return all of the golf course that was not part of the original grading permit (40 acres) back to the condition that existed before the unpermitted grading was conducted. She stated that an EIR is supposed to describe the environmental impacts that result from a governmental action. She said that CEQA does not apply to private actions unless the private activity involves governmental participation, governmental financing or governmental approval. She informed the Council that it can approve the golf course or it can require that it be returned to its preexisting conditions. She stated that the direct impacts of approving the project, as proposed, would be to allow an existing golf course to continue to exist. As the golf course existed when the notice of preparation was circulated, most of the direct impacts identified in the EIR are impacts associated with the operations of a golf course and not impacts that resulted as part of the construction of a golf course (baseline condition). If the City does not require that most of the golf course be removed and the site returned to pre golf course condition, then an indirect result of approving the proposed project would be the impacts of not restoring the property to its pre golf condition.

Ms. Yesney informed the Council that the indirect impacts are identified in the section of the EIR entitled "Secondary Impacts." She indicated that one of the more unusual parts of the EIR is the Secondary Impact section. She stated that CEQA guidelines advise that the lead agency must consider not only the direct physical changes in the environment that would result from a project but also any "reasonably foreseeable indirect physical changes that would result." If the City does not require that the property be restored, then it is reasonably foreseeable that the environmental conditions that were present on the property would not be replaced. She stated that the draft EIR identifies what those conditions were based on an evaluation of historic documents, including the records provided by the project proponent. She said that the secondary impacts identified in section 3 of the draft EIR are closely linked to the "no project: alternative which is required by law. She indicated that "no project" is defined by CEQA in the conditions that would exist if the project, as proposed, is not implemented. She

stated that no project would restore all 110-acres not covered by the 1997 grading permit for 40-acres back to the conditions that existed. She said that on going impacts associated with maintaining a golf course would cease and that there would be a substantial amount of additional grading with associated impacts that would be needed in order to restore the site to its pre golf course conditions. She stated that the “no project” alternative would have impacts of its own.

Ms. Yesney summarized her comments by stating that the “no project” alternative would occur if the City of Morgan Hill were to decline to approve the proposed project and to require the property owners to restore 110-acres of the site back to its condition before construction of the golf course. The secondary impact section of the EIR identifies the impacts that would occur if the City does not approve the “no project alternative” and does not require the property owner to restore the site. She pointed out that there are other methods of reducing the secondary impacts other than restoring the site. At the time that the draft EIR was circulated, those alternative mitigations, discussed in the EIR, were not proposed. She stated that the EIR evaluated the project as it was understood to be proposed.

Steve Sorensen informed the Council that he was in attendance representing the American Institute of Mathematics (AIM). He addressed the purpose of the project: to solve math problems. He stated that math is the fundamental tool by which scientists and engineers improve quality of lives. He said that AIM solves problems in a unique way, through a team approach. He stated that the teams of mathematicians need a place to meet. Because of the success that AIM has had in solving math problems, the National Science Foundation has given them a grant to create a math conference center in Morgan Hill. He stated that the mathematicians and scientists who will come to this conference center are use to all amenities provided by a university. The amenities include libraries, lecture halls, food service and recreational opportunities, including a golf course. He stated that he used Stanford University as a model for this project as they are AIM’s closest geographically competitor. He said that it is AIM’s hope to create an environment similar to Stanford’s in Morgan Hill so that they can attract the best mathematicians and scientists in the world. In addition to their focus on research, he stated that AIM has implemented outreach programs within the community. He stated that the current executive director, Brian Conrey, resides in the community and has been active in the “Math Counts” program in the local schools as well as the bay area Math Olympics and math circles. For these benefits to continue, AIM needs to build a math conference center in Morgan Hill. Therefore, AIM is requesting the approval of a PUD in order to build the math conference center. He stated that the EIR raises many issues regarding the site. Some of the issues are primarily legal issues and those issues typically involve the Endangered Species Act (e.g., California Red Legged Frog, Western Pond Turtle and the California Tiger Salamander). He stated that most of these issues have been resolved through an agreement with the U.S. Fish and Wildlife Service.

Mr. Sorensen stated that the issues that remain are the ones that he believes are most important because they are the issues that the public is concerned about. He indicated that he has distilled these down to four issues:

- Ground water depletion. He indicated that the current practice is to try and minimize the irrigation on site by using a weather station. They take the weather station input and feed it to a computerized irrigation control system which applies just the amount of water that the turf

needs. On hot days, rather than using the full amount of irrigation, individuals hand water hot spots. He stated that the irrigation system has been subject to review by the Santa Clara Valley Water District and that the review provided a favorable result for the water system. In addition to this, AIM has had studies prepared by a local hydrology firm called Aquifer Sciences. They have found that the water table is not declining.

- Nitrates in ground water. He said that the valley, as a whole, is characterized by increasing levels of nitrates in the ground water due to the history of agriculture. Before AIM conducts fertilization, they take a sample of the soil and send it to a laboratory. In addition, AIM cuts samples of the turf/irrigation water and sends these off to the laboratory as well. Based on the analysis, AIM determines how much fertilizer the plants and soil need. He stated that AIM basis the fertilization on this information so that they do not over fertilize. He indicated that this process has also been reviewed by the Santa Clara Valley Water District and that it has been confirmed that their fertilization process is correct. In addition to this, AIM has taken samples of the water on site to see if they are contaminating the surface water on site with nitrates. He said that the surface water on site has lower nitrates than the water in the aquifer which would indicate that if the water seeped down into the aquifer, it would dilute the concentrate of nitrates. Regarding the test well that the Santa Clara Valley Water District keeps across the street from the project, he said that one of three wells in the region meets the nitrate level for the Safe Drinking Water Act.
- Pesticides in the ground water. He stated that AIM only uses approved products by the State of California. Before applying any of these products, AIM registers with the County. AIM uses licensed applicators to use these products and use state of the art equipment to do so; only keeping what is needed for the near future. He stated that AIM has taken numerous samples of surface water on site to see if any of the pesticides and/or herbicides are getting into the surface water. These samples have come back with results that show there are no pesticides contained in the water. He said that it is AIM's plan to prepare a chemical application and management practice guide for the site. He will forward a copy of the guide to the City of Morgan Hill, once completed.
- Flooding. In order to control flooding, he stated that AIM has reduced impervious surfaces (e.g., reduced roadways, parking lots and removed several of the structures on site). This results in having more permeable earth available to absorb rainfall. He said that they have drained all run off into three detention ponds that allow for settlement before the water leaves the site and have limited the outflow from the property to one pipe that goes to the culvert located on Foothill Avenue. He stated that AIM has hired a consultant with expertise in hydrogeology of surface water and that this expert has drawn the conclusion that AIM has reduced the runoff from the site compared to pre project conditions. He stated that in 1999, AIM had one instance of local flooding attributed to a construction error. AIM moved the main entry to the middle of the property. When the apron was installed to connect Foothill Avenue to the property, a pipe was not installed to provide continuity in the drainage culvert. Therefore, during the first rain, water came down the culvert and was blocked by the apron. The water crested the apron and

stated that within a week, a pipe was installed in the culvert. He indicated that there have been no flooding issues since that time.

Randy Long, chief biologist, addressed the recent results of his monitoring work for pesticides, herbicides and other pollutants in the water. Because of the temporary use permit application, he increased the water sampling. He came up with months worth of data that he believes is evidential of what is taking place at the site with regard to pollution. He said that this has a lot to do with several of the conditions and mitigations that are proposed. Where he has found this evidence, he proposes slightly different mitigations commensurate with what he believes is taking place. He stated that he has not found the problem of the stated significant impact. He would like the draft EIR to treat the evidentials and come up with new conclusions about significance as he did not believe that impacts exist based on data. He indicated that Dr. Mark Jennings (special status species); Tom Neilly, Aquifer Sciences, (ground water data collection); and Dave Mattern (surface flooding issues) were in attendance to answer any questions that the Council or others may have.

Mayor Kennedy stated that the Council has received a letter and photographs from area residents (Mr. & Mrs. Matulich) expressing concern about flooding. The letter suggests that the drainage to Foothill Avenue be eliminated. He requested that it be explained how it is proposed to deal with this issue.

Mr. Long responded that he met with Mr. And Mrs. Matulich to discuss their concern. He agreed that the Matulich family unfortunately have a flooding problem and that he commensurates with them. However, the problem is that there is no conveyance along the ditch. Therefore, the water runs through the property on Foothill Avenue and then floods several properties. He clarified that flooding is not being caused by the golf course and that the Matulichs realized this fact after looking around at the slopes and other information.

Mayor Kennedy inquired as to the feasibility of using recycled water.

Mr. Long stated that the use of recycled water largely depends on what is available. He said that the issue is the installation of a pipeline and feeding it through the property. He stated that he has not investigated all of the circumstances at this point but that he is willing to look at this as an option.

Mayor Kennedy stated that there was discussion at one time about the possibility of piping recycled water from the wastewater treatment plant from SCRWA or the possibility of using a skimming facility with local treatment.

Director of Public Works Ashcraft informed the Council that the potential to use recycle water exists. He indicated that the City shares the wastewater treatment plant with the City of Gilroy. He stated that the cities generate more wastewater than they are able to recycle. He indicated that the Santa Clara Valley Water District is near completing of a plan that looks at wastewater reuse for the entire area and that it will show the potential for serving Morgan Hill. He said that there is a potential for piping recycled water from the SCRWA plant six miles uphill with pumping facilities. However, it will be very expensive to construct both the piping and pumping facilities. He indicated that the plan will also look at the possibility of a plant; taking an area in the city and building a package treatment plant

specifically for the reuse of water. He said that this could be another potential reuse of wastewater. He stated that this study will probably be finalized within the next six months.

Council Member Chang stated that she was not clear about the ground water nitrate. She said that according to the information provided, it is being stated that the laboratory analysis of water samples taken from the site indicate that there is low nitrate. She requested that additional information be provided.

Tom Neilly, Aquifer Sciences, indicated that water is pumped from the aquifer from the ground into irrigation lake/ponds. He stated that he tested ground water as well as the surface water in the pond. He said that there is a difference in concentration of nitrates. He stated that the nitrate concentration is somewhat lower in the ponds. He said that he is seeing consistent patterns as far as the nitrate concentration from monthly samples that commenced in August 2003 to the current month. He indicated that there is a mechanism of de nitrification occurring in the ponds. He said that it is not well understood what the mechanism is but that the sampling results are showing consistently lower levels. He informed the Council that water is pumped from the wells and into pond D. The water has a residence time in the pond and then pumped out on demand from the pond and distributed for irrigation. He indicated that it is ground water that has a residence time in the lake for a period of time.

Mayor Kennedy inquired whether in a worse case scenario, when there is a need to irrigate at the maximum level for a sustained period of time, would it deplete the irrigation pond so that whatever bio degradation of the nitrate that is occurring would still be allowed to continue. As an alternative, would all of the water in the pond be depleted and result in the loss of the capability for nitrate reduction.

Mr. Neilly responded that he was not sure if the answer to this question is known at this point in time.

Mayor Kennedy indicated that he has several speaker cards from individuals wishing to address the Council this evening. Therefore, he would be limiting comments to 2 minutes per person in the interest of time. He noted that the Council has a regular agenda scheduled for 7:00 p.m. He suggested that the Council continue with this workshop, followed by the regular meeting.

Mayor Kennedy opened the floor to public comment.

Brian Conrey, Executive Director of AIM, stated that AIM would like to relocate to Morgan Hill and have their conference center located on the property under discussion. He indicated that AIM is a national science foundation funded math institute, one of six in the country. He stated that mathematicians visit weeks at a time and work on solving important mathematic problems. He said that AIM can assist Morgan Hill with mathematics, education and culture. He stated that AIM has begun the Math Counts program for middle school students and that he hopes to expand this program to make it a regional program. AIM would like to start high school programs such as the Math Circles programs and a number of other programs that would be beneficial to Morgan Hill.

Rich Gamboa informed the Council that he is a resident of Foothill Avenue and resides directly across the street from the AIM golf course project. He stated that he has no problem with a beautiful golf

course located across the street as it may enhance property values. However, he expressed concern with the nitrate levels as the community does not need more drinking water problems associated with wells. He indicated that he had his well independently tested recently because of the perchlorate problem. It was found that he did not have the perchlorate problem but that it was found that the nitrate levels in his well had risen in the three-year period from when he first purchased his home. Although he does not have a lot of evidence, he sees that the three-year time frame shows that there is a trend for a nitrate problem. He felt that it would be important to monitor nitrate levels and not take the word of studies, especially those commissioned by the project proponent, in making a final decision in terms of how the mitigation plan and how individuals would be held accountable in years to come when the visible impacts are seen. He also expressed concern about the view, noting that the EIR did not mention anything about the visual impact problems. Also, construction noise is a big problem. He said that construction is already an inconvenience and that the roadway suffers impacts. Once construction begins on the building, there may be more inconvenience. He felt that the tree line is a problem in the sense that although it is nice to look at the hills, within 3 or 4 years, the views of the hills will be obstructed because of the height/density of the trees. He requested that consideration be given to this impact. He felt that there is a little bit of caution that needs to be taken in terms of making sure that the project mitigations are enforced.

Dr. Helen Moore, associate director of AIM, addressed the value that the Institute and what it would bring to this community. She works on disease models such as leukemia and HIV. She addressed AIM's commitment to women and minorities.

Dr. John Howe, president of the Santa Clara Valley Mathematics Association and mathematics teacher at Presentation High School, indicated that AIM has become a positive force in the community. He has participated in activities sponsored by AIM. He indicated that AIM members are willing to give talks and participate in activities without honoraria. He felt that AIM is a world class organization and the right organization for giving young people quantitative literacy in the 21st century.

Tatiana Shubin, professor of mathematics at San Jose University, addressed other mathematics programs for middle school and high school programs, indicating that these programs would not be possible without the support of AIM. It was her belief that Morgan Hill would benefit if AIM is allowed to establish in the community

Dr. Mark Jennings, Atlanta Resources, indicated that he worked on the turtle frog and salamander resources. He stated that he conferred with the Fish and Wildlife Services of the California Fish and Game and discussed how to best deal with the resources on the project. An agreement has been reached that would be to the benefit for all of the animals located on the site. He indicated that the frogs are doing reasonably well on the golf course and will do better once the mitigation is completed.

Brian Schmidt, Committee for Green Foothills, indicated that he has submitted comments on behalf of the Committee and the Santa Clara Valley Audubon Society after the deadline and were not included in the Council's packet. He distributed written comments for the record. He stated that this project has gone thru a long and convoluted history. At the heart, the project was built illegally without permits and caused a lot of the problems that are seen today. He noted that everyone was talking about math, noting

that the issue is not about math. He stated that the Committee or the Audubon Society have an objection to math research or math outreach. He indicated that the issue is the golf course. He did not believe that there was a need to cause environmental harm in order to do math. When you look at the EIR, there is a certain level of uncertainty in what is being discussed in the report. He felt that the applicant will suggest that the impacts described in the EIR are not as certain as the EIR indicates. However, he felt that this uncertainty goes back to the issue of the fact that AIM destroyed the environment first and then proceeded with the analysis. He stated that the issue for the City is to figure out how to handle this uncertainty. It was his belief that the burden of this uncertainty should be borne by the applicant who destroyed the evidence of the environmental impacts. In the case of certainty over the level of impacts and the amount of mitigation needed, it was his belief that the project proponent should mitigate to the maximum extent necessary. He noted that the EIR does not discuss whether the mitigations are feasible. He said that his indication of the EIR is that the mitigation measures are feasible. Therefore, there are no grounds or evidence in the record for the City to reject any of the mitigations on the grounds of infeasibility.

Kevin McCurley, mathematician/computer scientist, stated that he has traveled around the world to different conference centers to conduct math research. He addressed long term and short term world conference centers and their impact on mathematical research, indicating that the U.S. does not currently have such a facility. If Morgan Hill becomes the home of such a facility, it will be in good company with the other cities around the world. He stated that John Fry has been instrumental in building the Institute and funding the program for the Institute. He felt that the City should keep in mind that Mr. Fry has made contributions to society that are unusual and outstanding. These reflect on the character of the people behind the Institute.

Dana Ditmore, Foothill resident, indicated that he resides across the street from the new proposed math center. He stated that he is an engineer and that he has more of an educational interest in the project than he does as a resident. He felt that having the golf course across from him would enhance his property value. He was confident, from a technical stand point that the mitigations needed and recommended by a sound EIR statement can be used to address whatever valid concerns exist. He stated his support of AIM as it will offer the community opportunities and will be an asset to Morgan Hill and the San Martin community.

Joe Heinrich addressed the programs sponsored by AIM, including their outreach programs. He felt that AIM would present the opportunity for mathematics from the realm of the obtuse to the accessible. This is offered to our local area at a particular opportune time with the school funding crises. It is his hope that the Council will be able to resolve whatever conflicts exist and stated his support of AIM.

Tom Richardson, neighbor of the Institute, indicated that every time he has his well tested, the water contains nitrates. He felt that this is attributable to being surrounded by George Chiala farms. He did not believe that there has been a significant difference in nitrates in the water associated with the Institute. He felt that AIM would help his property value. He read a letter from his wife, Janet Redding, in support of AIM and their programs. She did not believe that AIM would result in traffic impacts but would bring tourism dollars to Morgan Hill restaurants and other businesses.

Ken Wagman, math instructor at Gavilan College, stated his support of AIM and their student programs. The opportunities that AIM will give the community as well as the community college/students are incredible. It is his hope that the City will be able to mitigate the problems in order to make sure that nothing is done to damage the environment.

Craig Breon addressed the visual impacts associated with the project. He noted that the EIR concludes that the visual impacts are not significant and that he would argue to the contrary. He displayed photographs of the area, including the grove of trees that have been planted tight on a berm. He stated that the residents are impacted visually. He felt that the solution would be to remove some of the trees, reduce the berm, plant more oaks and chaparral rather than non native poplar or other trees. He felt that a lot needs to change to make the golf course friendly to the neighbors, wildlife, water quality and other natural resources located on the site. He did not believe that because the golf course has been built, the City has to accept it. He felt that the Council has the responsibility to state the right type of golf course to be built. He also felt that the Council has the responsibility to resolve conflicting testimony in favor of the environment and the neighbors because the neighbors are not responsible for the problems that have been created.

Denise Matulich, property owner adjacent to the golf course, stated that it is important to mitigate the potential significant negative impacts that the golf course is having on the community. She stated that San Martin residents surround the golf course and would like to maintain a harmonious relationship with Morgan Hill. She felt that it was the Council's duty to require that the project proponent mitigates all of the negative impacts that have been cited in the draft EIR. It was her belief that Mr. Long misrepresented what he believes was the outcome of the visitation of what caused flooding, noting that it was not a conclusion that the golf course was not flooding adjacent properties. It only concluded that the culvert located on the west side of Foothill Avenue was not adequate to take the flow of water that may be cresting over the road coming from the golf course. She indicated that the area has extensive flooding with five feet of flooding going into her garage, noting that it all comes from the rear of the property. She felt that the Council needs to carefully consider the water situation. She indicated that nitrate levels have risen in the past three years as well and that San Martin is faced with mitigating this problem because they are a small mutual water company. She felt that the ground water needs to be protected. She agreed that the views are severely impacted with the rows of trees.

Lori Mains, citizen of Morgan Hill and parent of a Math Counts student, stated her support of AIM as they are dedicated to youth and community outreach.

Donald Cowan, Department Math Chairman at Live Oak High School, stated his support of AIM as it will be an outstanding partner with Morgan Hill and the Morgan Hill Unified School District. He indicated that AIM will be offering tutoring, guest speakers, in service training for math teachers and outreach programs.

Darlene Day, Foothill Avenue resident, indicated that she resides directly across from the golf course. She stated that the trees have a visual impact to her view of the hillside. She expressed concern with nitrates in the water. She said that she has seen trucks go in and out of the facility with trees and

equipment for the past seven years. She expressed concern with the impacts associated with the construction of the golf course and all the problems that have been occurring.

JJ Vogel, new resident to San Martin, stated that he was not here in support or against the golf course. He was in attendance to address the Council's duty to enforce the law. He said that math is the basis for just about everything one does and will do a lot of good for the community. However, he felt that a bad precedent would be set such that it sends a message that it is acceptable to break the law as you get rewarded at the end.

No further comments were offered.

Council Member Tate indicated that a lot of information was provided to the Council and that the Council has been studying this information for a period of time. He noted that the Council has received new information in terms of what AIM is willing to do and not willing to do. The Council has heard that there are some problems that may not be mitigated. He felt that the Council needs to determine what is left on the list and where there are disagreements in order to make sure that the City is heading in the right direction where disagreements exist.

Council Member Chang requested clarification about the flooding situation as there are conflicting stories about flooding.

Planning Manager Rowe responded that there is new information that the applicant has included in their response project this evening prior to the meeting. He stated that there was testimony provided at the Planning Commission meeting two weeks ago where the applicant felt that the off site flooding impacts were not longer apparent because the calculation showed that the amount of runoff from the site is at a level lower than it was prior to development of the golf course. Also, the ponds on the site have sufficient capacity for detention purposes. He noted that Mr. Sorensen indicated that the incident of flooding that occurred in 1999 was attributable to the fact that the culvert was not installed when the new driveway apron was put in and that it created a barrier. This resulted in water backing up, cresting over the roadway and flooding properties. He stated that staff will be looking at this information and including this information in staff's response comments in the final EIR. He clarified that David J. Powers & Associates will also be looking at this information and assessing it.

Council Member Chang noted that adjacent residents are stating that the nitrate levels have increased over the course of the past three years. She inquired whether the City has 10-years of records to determine the levels of nitrates in the area.

Planning Manager Rowe indicated that there are some monitoring wells in the area that have tracked nitrate levels over a period of time. He stated that this information has been reviewed by the consultant and is part of the basis for concluding that increase in levels of nitrate is a potential impact of the project.

Mayor Kennedy inquired what can be done to address the trees and the visibility from Foothill Avenue.

Planning Manager noted that this was not identified as a significant impact. However, the City has received testimony and comments that the trees are obstructing the views of the hills. He stated that staff will be evaluating the visual impacts of the trees. If determined that the impact is significant, staff would propose mitigation(s) as part of the mitigation plan. He said that mitigation may be undulating the height of the berm, establish view corridors and/or provide a continuous hedge row affect.

Council Member Tate inquired whether there were any other issues that were raised this evening such as the visibility issue that were not included in the draft EIR.

Planning Manager Rowe responded that it was his belief that all other concerns expressed were addressed in the EIR.

City Attorney Leichter clarified that there may be new information contained in the written material received this evening as well as the written comment period which may raise new issues. She recommended that Planning Manager Rowe address the process from this point on so that the Council and the public are informed of the process and timelines.

Planning Manager Rowe informed the Council that the public comment period has ended. However, the City has received requests from some of the responsible agencies for seven additional working days to submit their comments. He stated that it is staff's intention to honor this request. This would give Council members time to provide comments as well. He indicated that the EIR consultant would be receiving the information submitted and begin to prepare responses to them as well as to any other comments received. The final EIR, along with the mitigation monitoring plan, will be prepared in approximately four weeks. These documents will be presented to the Planning Commission for their consideration along with the zoning application for the PUD mentioned by Mr. Sorensen. A public hearing will be held at that time on the EIR with the zoning application. The Planning Commission will forward its recommendation on the adequacy of the EIR and its recommendation regarding certification to the City Council along with the mitigation monitoring plan. The Council will hold a separate public hearing to receive comments on the zoning action and the final EIR. He stated that the Council will be asked, at this point, to certify the EIR. Where there are significant impacts that cannot be fully mitigated, the Council will be asked to make findings of overriding consideration. He stated that there is one area of concern that cannot be fully mitigated contained in the cumulative section: the loss of agricultural land. Therefore, at a minimum, the Council will have to make findings relative to this impact. He said that public benefits of the project can be cited as findings for overriding this particular impact.

City Attorney Leichter further clarified that the next step is for staff to take all the comments, indicating that the comment period has been extended for the agencies who have requested additional time to submit their comments. The consultant will take these comments and prepare responses to them. These responses will go into the text of the final EIR so that everything is accounted for. She said that the final EIR document will go on to the Planning Commission and then to the Council.

Planning Manager Rowe indicated that it would take approximately four weeks to incorporate comments into the final EIR. However, it is a function of the nature of the comments. If the City receives significant substantive comments that require further review and investigation, this may result in taking

a longer period of time to prepare the final EIR. He noted that the City received a number of studies as part of the applicant's comment letter (e.g., drainage study analysis, surface water sampling information) and that all this information has to be reviewed by the consultant. Therefore, staff cannot give the Council an exact turn around time as it is a function of all of the comments received.

City Attorney Leichter stated that to the extent that there is significant new scientific information in either of the reports mentioned by Planning Manager Rowe or as the consultant and the City goes through the visual impact analysis, it is determined that it is a significant impact, the City may have to recirculate the EIR for comments. However, staff will not know whether the EIR will need to be recirculated until it goes into the analysis in the next couple of weeks. She indicated that recirculation of the EIR would require an additional 45-day review period.

Council Member Tate noted that Ms. Yesney presented a report on the EIR, stating that it is not a typical EIR where you have a pre existing condition because the pre existing condition was taken away. He inquired how this would affect the EIR that the Council is being asked to certify.

City Attorney Leichter indicated that the significance of Ms. Yesney's discussion deals with the conditions that were analyzed in the EIR. She concurred that nothing about the EIR was normal as the City was dealing with a project that had already been substantially constructed and that this is a very unusual situation. She clarified that the project is the golf course and that the Council would be looking at the impacts of the golf course. However, if the City does not require the golf course to be removed and the land be reverted, then there are secondary impacts from allowing the golf course to remain. This is when you need to go back to the pre existing condition because these are the foreseeable environmental affects that have not been documented or analyzed. She stated that staff had to go back and look at the pre existing conditions to account for the secondary impacts.

Planning Manager Rowe stated that if the Council takes what exists on the site at this time and approves it as it is, there are secondary impacts identified in the EIR associated with this. He said that there are mitigation measures proposed in the document that would reduce those impacts to a less than significant level with the exception of the loss of agricultural land.

Mayor Pro Tempore Sellers indicated that he worked on a former use of the site when he was younger. Therefore, he has knowledge of the site. He said that the impacts on the site in the early/mid 1970s were different. He said that one of the impacts referenced in several of the letters was traffic impact. In any given Sunday in the 1970s, you would have bus loads of individuals and cars visiting the site. He noted that there was nothing of this nature proposed with this use. However, there was some reference made to disallowing any special event or other use on the site. He indicated that he did not see a response to this comment. He inquired whether there has been discussion about special events being held on the site.

Planning Manager Rowe stated that it was his belief that Mayor Pro Tempore Sellers was referring to the charity golf tournaments reported in the media. He said that the City needs to establish a baseline and a project description. This would result in allowing the project to be evaluated at this baseline. At this point, there is no discussion on the types of activities that might generate additional traffic. Therefore, the action on the PUD zoning application will include a specific recommendation that such

events were not allowed, not because the City is opposed to the uses occurring, but because they have not been evaluated in the EIR. He stated that there would be a need to supplement or prepare a subsequent analysis to look at traffic impacts that might be associated with conducting such events. Once there is an opportunity to study, evaluate and mitigate impacts associated with a use, such activities could be allowed on the site.

Council Member Chang inquired whether the secondary conditions were looked at with this condition in mind.

City Attorney Leichter stated that she understands that the concern deals with the charity tournaments to be held on site and results in expanding the traffic use more than what exists today. She said that this has not been analyzed with this draft EIR and is not part of the project description. If the applicant does intend to have a charity golf tournament, they would have to apply for a conditional use permit and that there may be further environmental review required for other uses.

Mayor Kennedy inquired whether the prior owner's use of the facility as a restaurant and golf activities in the zoning still applies to the site.

Planning Manager Rowe responded that the conditional use permit granted for the Flying Lady Restaurant expired because of the length of time the use was inactive.

Ms. Yesney stated that had the site been left as it was when the first grading permit was requested with the restaurant building and all of the other uses in place, the project would have assumed a much higher base line. She said that it is frequently the case that she will prepare an EIR on an existing development with the buildings vacant and used them as background conditions for the baseline against which the project's impacts were evaluated. The traffic associated with existing, viable occupyable buildings could happen at any moment independent of whether or not a new project is approved. It was her understanding that the occupiability of the Flying Lady Restaurant building was under some question because of damage that had occurred. In addition, nothing had occurred on various parts of the site for some period of time. She indicated that this information was relayed to her when she was first retained in 2000. She said that what is generally the case with most conditional uses is that if the use laps for a substantial period of time, they are no longer valid. This is what she understood to be the case in this situation. She stated that most of the site had been regraded and replaced. She noted that a restaurant building exists but has not been used for a lengthy period of time prior to when she began the EIR analysis.

City Attorney Leichter clarified that the restaurant building had been red tagged because it had structural beam problems and could not be reused as a restaurant.

Planning Manager Rowe further clarified that the conditional use permit issued in 1981 expired after the use had been discontinued for a period of six months. The building had structural damage attributable to termite infestation, had been red tagged and that it is an uninhabitable structure to this date. If an individual wanted to reopen a restaurant, they would have to apply to the City for a new conditional use permit and receive permits to renovate and reconstruct the building. Staff would evaluate the

environmental impacts associated with the reestablishment of a restaurant at that level of activity on the site even though the property had been previously entitled to the use in years past. If the baseline is more intensive, it may trigger the need for environmental review. As the golf course was allowed to sit vacant for several years, AIM was required to prepare an environmental assessment to reuse the site as a golf course. Staff required an environmental assessment and issued an environmental determination and negative declaration on the reconstruction of the golf course in the location where it existed. In response to Mayor Pro Tempore Sellers' inquiry, he indicated that impacts addressed by individuals associated with the golf course would be addressed in the course of preparing the EIR to a significant degree.

Council Member Tate disclosed that he toured the golf course facility approximately 1.5 weeks ago with Mr. Long and Mr. Sorensen.

Mayor Pro Tempore Sellers and Mayor Kennedy stated that they also took the tour as well.

Action: *The City Council **Received** Applicant and Staff Presentations and Public Comment and Provided Comment on the Revised Draft EIR.*

The Council concluded the workshop at 7:55 p.m.

City Council and Redevelopment Agency Action

CLOSED SESSIONS:

1.

CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION

Authority:	Government Code Sections 54956.9(b) & (c)
Number of Potential Cases:	2

The closed session items were deferred to a future meeting.

SILENT INVOCATION

PLEDGE OF ALLEGIANCE

Mayor/Chairman/President Kennedy led the Pledge of Allegiance.

PROCLAMATIONS

Mayor Kennedy presented Tiffany Shyuan and Derek Chan, Co-Presidents of the Live Oak School Chapter of FBLA, with a proclamation declaring February 8–14, 2004 as *National Future Business Leaders of America Week*. Ms. Shyuan and Mr. Chan identified community/service activities that is conducted by the FBLA membership.

CITY COUNCIL REPORT

Mayor Pro Tempore Sellers reported that he serves on the Legislative Subcommittee of the City Council. He said that one of the biggest issues faced by the Legislative Subcommittee and the City Council was the Patriot Act and whether or not it had an impact on the local community. He said that the degree to which larger issues are being dealt at the state and national levels will directly impact Morgan Hill. He stated that in recent weeks, the Subcommittee has grappled with several of these issues that are coming from Sacramento. He said that there are two other issues that have taken place recently that will have a direct impact on the community: 1) At the state level, the City is starting to realize that there will be a reduction in some of the funding that it has relied upon for community service projects. This will cause a retooling of these projects either by deferring them, trying to find other funding resources or they will not get done. He said that the City's general fund is being impacted by the economy and State losses. He felt that the Council needs to continue to do a good job in pointing out to the community that these losses have real impacts on the community and what these impacts are. 2) The federal government recently announced that the budget being proposed by President Bush for consideration by the Congress is expected to eliminate funding for a project the City has been pushing for well over 20-years and the City started to make headway a few years ago known as the PL566 project. He said that the impacts to the community are significant because of flood control issues that occur through the core of the community, particularly in some of the lower income areas of the community. The residents or landlords have to carry flood insurance which raises the cost of housing through the core area. He felt that it is important for individuals to be aware that when the community sees things happen at the federal level one does not believe that they will impact local projects. However, every family that has to pay \$500 or more every year for flood control insurance because the City is not able to mitigate the flooding problem needs to keep this in mind that these are direct impacts to the local community. He stated that there were four other issues that the Subcommittee reviewed. He stated that there are three bills that are before the legislature that would be extension of current bills and that the Subcommittee is recommending Council support of these: 1) AB1224 (Diaz) amends Megan's law and provides increased access to the sex offender data base via the internet; 2) AB1466 (Koretz) a statewide program entitled "Don't Trash California" that would direct state agencies to collaborate in their litter prevention effort; and 3) SB1087 extends the "Safe Route to Schools Program." He noted that there are four major propositions on the March 2, 2004 ballot. Although the Legislative Subcommittee saw potential impacts on all four of the propositions, the Subcommittee did not see the kind of impact that could be discerned on the community to take a position at this time.

CITY MANAGER REPORT

Assistant to the City Manager Dile indicated that she did not have a City Manager's report to present this evening.

CITY ATTORNEY REPORT

City Attorney Leichter stated that she did not have a report to present this evening.

OTHER REPORTS

PUBLIC COMMENT

Mayor/Chairman Kennedy opened the floor to public comment for items not appearing on this evening's agenda.

J.J. Vogel stated that he was impressed with the Morgan Hill Community and the City's growth measure. He noted that the restaurant use did not break the law but that the golf course did. He inquired why the Council allowed the golf course use to continue when they broke the law. Does this mean that if he wanted to build a use that would be good for the community, but breaks the law, he would be allowed to get away with it? He requested that Council members respond to his questions at the next meeting.

No further comments were offered.

City Council and Redevelopment Agency Action

CONSENT CALENDAR:

Mayor Kennedy requested that item 16 be removed from the Consent Calendar as he resides within 500 feet of the project.

Action: *On a motion by Mayor Pro Tempore Sellers and seconded by Council Member Chang, the City Council/Agency Board unanimously (5-0) **Approved** Consent Calendar Items 2 - 15, as follows:*

2. **SUBDIVISION, SD-03-15: EAST CENTRAL-WARMINGTON**
Action: **Took No Action**, *Thereby concurring with the Planning Commission's Decision Regarding Approval of the Subdivision Map.*
3. **WATER RATE SURCHARGES**
Action: **Adopted** *Resolution No. 5766, Revising Monthly Water System Fees.*
4. **2003-2004 CITY WORKPLAN, SECOND QUARTER UPDATE**
Action: **Accepted** *Second Quarter Update of the 2003-2004 Workplan.*

5. **REIMBURSEMENT FOR STORM DRAIN IMPROVEMENTS BY QUAIL CREEK PHASE I (TRACT 9427)**
*Action: 1) **Approved** Appropriation of \$103,881 from Current Year Unappropriated Storm Drain Impact Fee Fund to Fund this Reimbursement; and 2) **Authorized** the City Manager to Execute the Reimbursement Agreement on Behalf of the City.*
6. **ACCEPTANCE OF SUBDIVISION IMPROVEMENTS FOR TRACT 9426, CENTRAL PARK PHASE V**
*Action: 1) **Adopted** Resolution No. 5767, Accepting the Subdivision Improvements Included in Tract 9426, Commonly Known as Central Park Phase V; and 2) **Directed** the City Clerk to File a Notice of Completion with the County Recorder's Office.*
7. **SECOND AMENDMENT TO AGREEMENT WITH THE LAW FIRM OF HATCH & PARENT**
*Action: 1) **Authorized** the Appropriation of \$106,000 From the Unappropriated Water Fund Balance into Account 650-42230-5710 to Fund the Continuing Legal Services of Hatch & Parent; and 2) **Authorized** the City Manager to Execute a Second Amendment to Agreement with the Law Firm of Hatch & Parent.*
8. **AMENDMENT TO AGREEMENT WITH THE LAW FIRM OF ENDEMAN, LINCOLN, TUREK, & HEATER**
*Action: **Authorized** the City Manager to Execute an Amended Agreement with the Law Firm of Endeman, Lincoln, Turek & Heater.*
9. **APPROVE PURCHASE ORDERS FOR THE TENANT IMPROVEMENTS FOR THE NEW POLICE FACILITY – GENERATOR**
*Action: **Authorized** the City Manager to Approve a Purchase Order in the Amount of \$54,578.34 to Spiess Electric for the Generac Power System Generator Purchased for the Tenant Improvements at the New Police Facility.*
10. **APPROVE PURCHASE ORDER FOR THE FURNISHINGS, FIXTURES, AND EQUIPMENT (FF&E) FOR THE NEW POLICE FACILITY**
*Action: **Authorized** the City Manager to Approve a Purchase Order in the Amount of \$12,920.00 to Sirchie Fingerprint Laboratories Inc. for the Furniture, Fixtures and Equipment (FF&E) at the New Police Facility.*
11. **APPROVE WATSON FURNITURE AS SOLE SOURCE VENDOR FOR THE UPGRADE OF EXISTING FURNITURE FOR THE NEW POLICE FACILITY**
*Action: **Authorized** the City Manager to Approve a Purchase Order in the Amount of \$22,268.65 to Watson Furniture for Upgrades and Expansion of the Existing Dispatch Consoles for the New Police Facility (Portion of the Previously Approved FF&E Budget).*
12. **APPROVE PURCHASE ORDERS FOR THE TENANT IMPROVEMENTS FOR THE NEW POLICE FACILITY – SECURITY SYSTEMS**

Action: **Authorized** The City Manager to Approve a Purchase Order for the Design, Purchase and Installation of Card Readers, Closed Circuit TV, New Phone System, Fire and Security Alarm Systems Purchased for The Tenant Improvements At The New Police Facility, as amended.

13. **ADOPT ORDINANCE NO. 1652, NEW SERIES**

Action: **Waived** the Reading, and **Adopted** Ordinance No. 1652, New Series, and **Declared** That Said Title, Which Appears on the Public Agenda, Shall be Determined to Have Been Read by title and Further Reading Waived; Title as Follows: **AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MORGAN HILL APPROVING TEXT AMENDMENTS TO SUBSECTIONS 18.76.130A8, 18.76.250C AND 18.76.250F OF CHAPTER 18.76 (SIGN CODE) OF TITLE 18 (ZONING) OF THE MUNICIPAL CODE OF THE CITY OF MORGAN HILL ALLOWING CHANGEABLE COPY SIGNS FOR MOVIE THEATERS. (ZA-03-16: CITY OF MORGAN HILL-TEXT AMENDMENT/SIGN CODE).**

14. **ADOPT ORDINANCE NO. 1653, NEW SERIES**

Action: **Waived** the Reading, and **Adopted** Ordinance No. 1653, New Series, As Amended, and **Declared** That Said Title, Which Appears on the Public Agenda, Shall be Determined to Have Been Read by title and Further Reading Waived; Title as Follows: **AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MORGAN HILL ADDING SECTION 18.54.200(Interim Use Permits) TO CHAPTER 18.54 (Condition and Temporary Use Permits) OF TITLE 18 (ZONING) OF THE MUNICIPAL CODE OF THE CITY OF MORGAN HILL REGARDING PERMITS FOR INTERIM USES.**

15. **MINUTES FOR SPECIAL CITY COUNCIL MEETING OF JANUARY 14, 2004**

Action: **Approved** the Minutes as Written.

City Council and Redevelopment Agency Action

CONSENT CALENDAR:

Action: On a motion by Mayor Pro Tempore/Vice-chair Sellers and seconded by Council/Agency Member Chang, the City Council/Agency Board, on a 4-0 vote with Council/Agency Member Carr absent, **Approved** Consent Calendar Items 17 and 19 as follows:

17. **MINUTES FOR JOINT SPECIAL CITY COUNCIL AND SPECIAL REDEVELOPMENT AGENCY MEETING OF JANUARY 16, 2004.**

Action: **Approved** the Minutes as Written.

18. **MINUTES FOR JOINT SPECIAL CITY COUNCIL AND SPECIAL REDEVELOPMENT AGENCY MEETING OF JANUARY 17, 2004.**

Action: On a motion by Mayor Pro Tempore/Vice-chair Sellers and seconded by Council/Agency Member Tate, the City Council/Agency Board **Approved** the Minutes as amended.

19. **MINUTES FOR JOINT SPECIAL AND REGULAR CITY COUNCIL AND SPECIAL REDEVELOPMENT AGENCY MEETING OF JANUARY 21, 2004.**

Action: *Approved the Minutes as Written.*

City Council, Redevelopment Agency, and Morgan Hill Finance Authority Commission Action

CONSENT CALENDAR:

Council Services and Records Manager Torrez requested that Item 20 be removed from the Consent Calendar to incorporate an amendment to pages 2 and 3. The amendment is to reflect that the appointments to the ARB are for terms to expire on June 1, not March 1.

20. **MINUTES FOR JOINT SPECIAL AND REGULAR CITY COUNCIL, SPECIAL REDEVELOPMENT AGENCY, AND MORGAN HILL FINANCE AUTHORITY COMMISSION MEETING OF JANUARY 14, 2004.**

Action: *On a motion by Mayor Pro Tempore/Vice-chair Sellers and seconded by Council/Agency Member/Financing Authority Commissioner Chang, the City Council/Agency Board/Financing Authority, on a 4-0 vote with Council/Agency/Financing Authority Member Carr absent, Approved Consent Calendar Items 20, as amended.*

City Council Action

CONSENT CALENDAR:

Mayor Kennedy excused himself from the dias.

Action: *On a motion by Council Member Tate and seconded by Council Member Chang, the City Council Approved Consent Calendar Items 16 as follows:*

16. **ADOPT ORDINANCE NO. 1651, NEW SERIES**

Action: *Waived the Reading, and Adopted Ordinance No. 1651, New Series, As Amended, and Declared That Said Title, Which Appears on the Public Agenda, Shall be Determined to Have Been Read by title and Further Reading Waived; Title as Follows: **AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MORGAN HILL APPROVING AN AMENDMENT TO ORDINANCE NO. 1599, NEW SERIES, AMENDING THE DEVELOPMENT AGREEMENT FOR APPLICATION MP-01-07: SHAFER – BAMDAD TO INCORPORATE A ONE-YEAR EXTENSION OF TIME FOR THE SEVEN, PHASE I UNITS AND A ONE-YEAR EXTENSION OF TIME FOR THE EIGHT, PHASE II UNITS OF THE 15-UNIT DEVELOPMENT. (APN 728-10-005)/(DAA-02-07: SHAFER – BAMDAD): AYES: Chang, Sellers, Tate; NOES: None; ABSTAIN: None; ABSENT: Carr, Kennedy.***

Mayor Kennedy resumed his seat on the dais.

City Council Action

PUBLIC HEARINGS:

21. DEVELOPMENT AGREEMENT, DA-03-14: EAST CENTRAL-WARMINGTON – Ordinance No. 1655, New Series

Director of Community Development Bischoff presented the staff report.

Mayor Kennedy opened the public hearing. No comments being offered, the public hearing was closed.

Action: *On a motion by Council Member Tate and seconded by Mayor Pro Tempore Sellers, the City Council, on a 4-0 vote with Council Member Carr absent, **Waived** the Reading in Full of Ordinance No. 1655, New Series..*

Action: *On a motion by Council Member Tate and seconded by Mayor Pro Tempore Sellers, the City Council **Introduced** Ordinance No. 1655, New Series, by Title Only as follows: **AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MORGAN HILL APPROVING A DEVELOPMENT AGREEMENT, DA 03-14 FOR MP 02-19: E. CENTRAL - WARMINGTON (APNs 726-20-003 & 726-28-048 through 052), by the following roll call vote: AYES: Chang, Kennedy, Sellers, Tate; NOES: None; ABSTAIN: None; ABSENT: Carr.***

City Council Action

OTHER BUSINESS:

22. RECONSIDERATION OF APPEAL APPLICATION AP-03-07: WEST MAIN-VIERRA

Mayor Pro Tempore Sellers stated that he would be recusing himself from this item and excused himself from the Council Chambers.

Director of Community Development Bischoff presented the staff report, indicating that the Council heard the applicants request to overturn staff's decision to reject a Measure P application on January 14, 2004. After hearing all of the testimony, the Council directed the City Attorney to seek declaratory relief on the matter from the court. On January 21, 2004, Mr. Tichinin, the attorney for the appellant, spoke under public comment and requested that the Council reconsider its earlier action. As it was not an agenda item, the Council directed staff to place the item on the agenda this evening. He indicated that the question before the Council this evening is whether or not the Council wishes to reconsider its prior decision. Should the Council decide to reconsider its prior action, he recommended that the

Council direct staff to agendize reconsideration for the February 18, 2004 meeting. He did not believe that it would be appropriate for the Council to get into full discussion of reconsideration this evening.

Council Member Tate noted that it was indicated last week that there would be new information presented. However, he did not see new information included in the agenda packet. He questioned why the Council was being asked to reconsider its prior action.

Council Member Chang inquired whether a majority of the Council would be required or whether three votes would be sufficient to reconsider the Council's previous action.

City Attorney Leichter responded that the motion for reconsideration would be a minute order action and not a resolution which now requires three votes of the Council due to January 1, 2004 changes in State law. Therefore, a minute action could be approved with three votes.

Mayor Kennedy opened the floor to public comment.

Bruce Tichinin, attorney for the applicant, stated that the last time the Council heard this matter; he suggested that the intent set out in the text of the General Plan prevailed over the mistaken rendition on the map of the text. The City Attorney suggested that the text of Measure P adopting the mistake prevailed over the intent because of the original enactment of the Council as Measure P was a superior force and enactment of the people. He indicated that one of the neighbors suggested that the Council should have sympathy on her reliance of an error. The Council referred the matter to a court for declaratory relief at the request of the City Attorney. He requested that the Council set the matter for reconsideration based on the new grounds to be presented at the February 18, 2004 meeting. He said that the new matter that he proposes to raise at the re-hearing, if granted, includes the following: 1) Is this response to the City Attorney's otherwise correct statement that Measure P, even though it adopted a mistaken line, should prevail over the intended line contained in the text. He said that the doctrine of *diminimus*, or that the law disregards trifles, prevails over the language contained in Measure P. He stated that he expects to show the Council that the amount of open space at issue is a trifling matter and the Council should disregard the affect of Measure P that adopted the error because it deals with a trifling amount of extra open space. 2) The mistake in the line for the open space developed areas, around El Toro, adopted in the General Plan map was meant to be but technically could not be achieved as the 500 contour line called out in the text, in the general plan is so inconsistent from property to property all the way around Measure P as to be arbitrary and capricious. This denies individuals such as the applicant/appellant Howard Vierra equal protection of the law when it operates to take out developed uses of open space land. He indicated that Mr. Vierra would demonstrate the inconsistencies being discussed. 3) The neighbors' errors and fears are not good evidence on which the Council can base a decision on zoning matters as ruled under Supreme Court case of *Claybon vs. Texas* and *Del Monte Dunes vs. the City of Monterey*. He felt that the burden is such that the City Attorney has to demonstrate the reasoning behind her position that there is no inconsistency in the General Plan because her position is that "one equals two" which he suggests is logically inconsistent on its face. He said that the testimony of the Planning Director demonstrates that what was supposed to be one line actually ends up being two because the line called out in the General Plan text is a 500 foot contour line. He stated that the Planning Director could not faithfully, with the technology available to him, render the 500 foot line.

He felt that the two lines are supposed to be one line. He did not understand how it would be consistent to have two lines in different places representing what is to be one line.

Mr. Tichinin stated that the diminimus evidence that he would like to present refers to is in to the case of *Oats vs. Sacramento* held in 1978 (case 78 Cal 745) that holds that 3.4% or less of a geographical error invokes the rule that it is a trifling amount and that you disregard the affect of law that would otherwise apply. As to the equal protection argument, he stated that the rule is that equal protection guarantees that persons who are similarly situated for the purpose of a governmental regulation will be treated equally by it. He contended that this rule is violated by the General Plan map line because instead of following the 500 foot contour line, as it was supposed to, it jogs back and forth inconsistently and infrequently on the line. He noted that some property owners get more open space than they would have had on their parcels while others, like Mr. Vierra, get less. He did not believe that there was consistency from parcel to parcel and felt that this shows that it is arbitrary, capricious and does not treat people similarly.

Mr. Tichinin addressed the neighbors' errors and fears as not being good evidence. He cited the case of the City of Clayborn Living Center (473 U.S. 432, page 448). The ruling was that the court specifically rejected the legitimacy of relying on opposition to the home by neighbors. He quoted from this case as follows. "Mere negative attitudes or fear unsubstantiated by factors which are properly cognizable in zoning proceedings are not a permissible basis for treating a home for the mentally retarded different from apartment houses, multiple dwellings or the like." He did not believe that this was a basis for treating this application differently than it should have been treated had the line been drawn faithfully. He addressed one other ground, in addition to the diminimus comment, that being that Measure P adopts the mistaken line. He said that the City of Clayborn case holds to the equal protection right because it constitutional trumps the force of an initiative. He quoted that "it is plain that the electorate, as a whole by referendum, could not order city action violation of the equal protection clause. The City may not avoid that cause by deferring to the objections of some fraction of the body politic, thus, indirectly giving it the same affect." He contended that the referendum is the same as an initiative for purposes of the ruling because it comes from the people versus the City Council.

Council Member Tate stated that the Council is receiving legal arguments after the Council decided that it was going to seek declaratory relief to get the legal arguments in front of someone who can make a legal decision. The appeal back to the Council to reconsider is based on is what it tried to get away from. He did not understand the purpose of going through the appeal hearing at this time.

Mr. Tichinin indicated that he is suggesting that there are new grounds to which the Council has not heard the City Attorney object to. If the City Attorney does not state an objection, he suggested that the law places on the City Council a certain obligation to know these facts. He stated that it has been held, under some federal court of appeal and Supreme Court cases, that City Council members are supposed to know the laws just like police officers are required to know the law. He urged the Council to reconsider the appeal in the spirit of trying to make its way through the appeal. It was his belief that the Council could understand the logic of the legal points and that it has a certain duty to decide upon them. He said that he would be willing to go to court if it were not such an expensive proposition for the appellant and felt that it was unnecessary to do so. He felt that there was an alternative that the Council

can adopt. The Council could reconsider and rezone to make the line what it should have been. He stated that it would cost approximately \$25,000-\$50,000 to seek declaratory relief action. He suggested that this is an unnecessary burden when there is a less expensive alternative. He indicated that in the case of *Bob Lynch vs. Paulson/City of Morgan Hill* has cost his client over \$90,000 and that there is every indication that there is only a fair distance into this case. It was his hope that the Council would keep this consideration in mind.

Virginia Acton, a 68-year resident of Morgan Hill, indicated that the Acton family came to Morgan Hill in 1910. This was the time that the property in question was purchased and consisted of approximately 75 acres that went from the top of El Toro to Peak Avenue. In the 1970s, the family sold the property to which the library, city buildings and the Hidalgo development occurred. What is left is the property in question. She said that the neighbors are protesting against a development who are living on Acton property that was developed years ago. The Acton property also includes the 20 acre parcel which is the face of El Toro that is designated for preservation in open space in the City's General Plan. She requested that the Council permit the last Acton family member to tastefully develop the last developable parcel of family land at lower density and greater home value than the adjoining neighborhood. She indicated that she is contracting to sell her land to Mr. Vierra and requested that the Council grant Mr. Vierra's request for reconsideration of the appeal. She indicated that it is too much property and work for her.

Howard Vierra addressed the wholesale inconsistencies and misrepresentation to the public of what the open space directive was. It was his belief that the open space directive was that the open space was to be at the 500 foot line of El Toro. He felt that the map misrepresents open space in various areas of the City. He stated that individuals above the 500 foot line will be able to develop their properties because they do not have an open space overlay imposed on their property while he is not being allowed to develop above the 500 foot line unless the City seeks declaratory relief. He felt that the error was in both directions and that there will be other property owners who will be coming before the Council stating that a mistake was made that needs to be fixed. He felt that the City could have the equipment to represent the 500 foot line drawn correctly. He requested that the Council enforce what was approved at 500 feet. He felt that there were inconsistencies in both the zoning map and the general plan map that affect him adversely. He did not believe that interests are being dealt with equally. He felt that the open space was drawn wrong and has caused a lot of individuals to become upset. He requested that the Council enforce what was ruled through a public forum to set the line at 500 feet. He did not believe that there was a public process that allowed the line to be rendered further down below the 500 foot line, in some cases 350 feet. He requested that the Council not direct that he be put through the additional expense and time to enforce the law.

Colleen Fettig, Via Grande, indicated that she recently found that the property has been rezoned since she purchased her property. She did not know that the property had been rezoned until the issue was raised last week. She noted that Ms. Acton requested that the property be rezoned in 2001 and that the rezoning of the property happened to coincide with the General Plan. Therefore, notification was not given to property owners as it was listed in the Morgan Hill Times. She said that she found that the open space boundary is a zoning district line. She felt that there needs to be public discussion when you move a boundary. Had neighbors not seen stakes being laid out by surveyors, neighbors would not have

known of the development proposal before the Council. She did not believe that the map was drawn haphazard, nor does it appear to be an error or mistake. She felt that it was a straight line that was drawn from point A to point B. She stated that the line follows property lines and did not believe that a pencil mistake was made. The lines were drawn as approved zoning district lines and that she did not believe that the line should be redrawn. She felt that this is a legal matter that needs to go before the court as no one has discussed how lines should be resolved.

Monte Jensen, West Main, stated his support of the City Attorney's decision at the last Council session that it would be inappropriate to move the Measure P line. He stated his disappointment in attorneys trivializing the infringement of open space. He stated that it was his understanding that Mr. Tichinin was a strong advocate of establishing open space in Morgan Hill.

Jim Kavitsky addressed the open space line that is currently shown on the map, indicating that it was his belief that the line was in place for many years, but not for so many years that surveying technology was insufficiently advanced to place it with adequate precision. The fact that the line has been on the map for many years means that many individuals have been looking at the map and using it to make important decisions with regard to development or purchase real estate in Morgan Hill, including himself. He felt that it is a bad time to change the line after all these years for apparently no other reason than to maximize the development value of the land at a negative cost to surrounding homeowners. He indicated that most of the homeowners have no objections to the development of the property, but that they would like development to be within the original zoning guidelines. He did not believe that the amount of open space is a trifling or diminimus because it will have a drastic affect on how the property is developed in terms of open space with five acre lot sizes or higher density housing. This is critical to existing homeowners and is not a trivial issue. If the City is serious about preserving a green belt and open space within Morgan Hill, he did not believe that there was any place more critical that the City should hold the line than El Toro as it is the most prominent natural feature to the point that it is the City's logo.

Susan Berardini indicated that she read the minutes where Mr. Tichinin requested Council reconsideration. She read in the minutes that Mr. Tichinin articulated the changed circumstances to the fact that the neighborhood was going to agree and support the move to reconsider. She noted that the minutes also indicate that Mr. Tichinin had new case law and that the Council agreed to agendaize Mr. Tichinin's request for Council consideration this evening. She noted that Mr. Tichinin has cited case law and talks about equal protection. She stated that the Council has a City Attorney who can figure out these issues and that if there is a disagreement, the Council's previous action was appropriate. If there is a legal disagreement and there is a legal question, the Council should seek declaratory relief. She stated that this is an appropriate action and that there are no changed circumstances. She felt that Mr. Tichinin would like to make a legal argument to the Council and have the Council make a decision to avoid legal costs. Had the property been zoned properly, the homeowners would not be in attendance this evening. She suggested that the question requires declaratory relief as the Council is hearing legal arguments. The fears and errors as they were called by the neighbors are not fears and errors. She noted that the neighbors have sent a letter to the Council articulating the position of reliance on a general plan and an initiative such as Measure P. She did not believe that these were diminimus as it was an initiative voted

upon by the residents of the community. She stated that the neighbors' feelings are based on this reliance.

Mr. Tichinin indicated that nothing in the neighbors' letter indicate that they relied on the line in Measure P. He clarified that it was his expectation that the neighbors would want what the developer wants because it would be better for them versus smaller lots closer to them that would have to design under staff's rendition of the line. However, he felt that it appears that the neighbors want to stick with the nimbism position instead. He noted that the adjacent neighbors' letter states that every neighbor contacted thus far have voiced the opinion that the current/proposed plans for the development of the Acton property would be detrimental to the neighborhood and other citizens of Morgan Hill who seek to preserve El Toro. The letter also states that there is nothing in the General Plan or Measure P that precludes the designation of open space below the 500 foot elevation, only above. He said that there is nothing in the letter about any body having actually relied on this relatively imperceptable line on the map being different from when they voted on Measure P. He noted that Mr. Kavitski states that he relied on this line but that he does not tell the Council what it is that he perceives to be different about the low density impact to him compared to what the development would be based on the mistaken line. He indicated that the neighbors based a claim on reliance but that he did not believe that they have substantiated it. Therefore, it should not be considered by the Council as they have offered no proof of this. It was his hope that Ms. Bernardini was not stating that declaratory relief is an action it must take as a matter of law. He did not belief that this position was correct and that the Council would be advised by the City Attorney that it needs not seek declaratory relief. The Council may instead take the approach he is proposing if it so chose; this would be to set the line straight at future public hearings. Regarding Mr. Jensen's disappointment in what he perceives to be his change in position, he stated that he was disappointed that people who have the benefit of such open space on El Toro being preserved for them by his largely uncompensated work from the "Save El Toro Association" do not believe that he would still have the same integrity in terms of the impact of public view on El Toro as he did back then. He said that the development would interfere with a handful of individuals' views but only that and only out of their residences. He said that all of the true scenic value of El Toro from public places will not be impacted at all by this proposal.

No further comments were offered.

Council Member Chang indicated that following the last Council meeting on this issue, an individual stated that the Council "punted" on its decision. The Council did not make a decision on the matter and that it was going to allow someone else to make one for it; a smart move. She felt that today's decision is whether the Council will reconsider its prior decision to hear this case or not. She noted that in most other situations, the Council would hear the matter and render a decision. She indicated that this is the first time that she has seen the Council take a case to court. By not making a decision and asking a lawyer to spend \$25,000-\$30,000 to make a case in order to defend himself, she felt that the Council made a decision for the attorney; a decision of denial. She stated that she was of the opinion that the Council should hear the case and decide on the matter. It was also her opinion that instead of the Council making a decision, the Council is allowing someone outside of the City to make a decision.

Council Member Tate stated that his opinion has not changed from what he expressed earlier. He did not agree that the City Council has to make a ruling of a legal nature. He noted that there are supreme courts and courts of many justices that sit and have split decisions. The Council can make a decision and it may be the right decision of the law. He felt that the Council has to protect the City. He stated that at the last meeting he was in sympathy with the applicant because the City intended to use the 500 foot line but that it is not what could be ruled by somebody interpreting Measure P. Although he was sympathetic to the applicant, he felt that the Council should get the matter determined once and for all or it can cost the City more than \$25,000-\$50,000 with other actions taking place later from a legal stand point. He stated that he was still of the opinion that the City should seek declaratory relief. He inquired whether there was any new information that the City Attorney would like to share with the Council.

City Attorney Leichter informed the Council that it was her belief that a court would likely construe the provisions in this matter. It is the Council's decisions whether or not to seek declaratory relief because it may have policy reasons to do so. She felt that there is conflicting language between the open space goal and action 4.1 which contains the 500 foot line language. It was her belief that a court is likely to find that the open space goal will prevail because the action language about the 500 foot line can be reconciled and that they are not inclusive. However, there is a possibility that the Court would find in accordance with Mr. Tichinin. She said that this would be the debate before the court. She stated that a precedent exists as the Council has sought declaratory relief in the past (e.g., a hotel that was not paying its transient occupancy tax in a timely manner). However, this action is highly unusual. She clarified that the motion before the Council this evening is not the appeal. What is before the Council is whether it wants to hear the appeal. What Mr. Tichinin has brought forth are grounds he believes are reasons for the Council to reconsider. It was her belief that Mr. Tichinin has raised new grounds such as the diminimus argument and the trifling argument under civil code. He has also raised equal protection arguments. She stated that it is within the Council's discretion whether it considers these reasons sufficient to reopen this matter or whether the prior decision should stand. Should the Council want her to fully respond to these matters, she could do so. However, she suggested that it would be in the context of the appeal hearing itself and not this evening as it is a procedural issue before the Council. She indicated that she has spoken with Mr. Vierra and Mr. Tichinin and could initially respond to the issues raised this evening.

Mayor Kennedy noted that Mr. Tichinin raised the question of equal protection on the basis that the line location appears to be arbitrary. He indicated that he recalls being on the Planning Commission when the line was established and that it was not arbitrary. Therefore, he sees no new information that would cause him to want to change the vote he took last time.

Action: *On a motion by Council Member Tate and seconded by Mayor Kennedy, the City Council **Confirmed** the previous action taken at the January 14, 2004 meeting to seek declaratory relief from the court. The motion carried 2-0-1 with Council Member Chang abstaining and Council Members Carr and Sellers absent.*

FUTURE COUNCIL-INITIATED AGENDA ITEMS

No items were identified.

ADJOURNMENT

There being no further business, Mayor/Chairman/President Kennedy adjourned the meeting at 9:35 p.m.

MINUTES RECORDED AND PREPARED BY:

**IRMA TORREZ, CITY CLERK/AGENCY SECRETARY/
COMMISSION SECRETARY**